

DEC Leaves Hydrofracking Loophole

Municipal zoning law could keep oil companies out

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NEW YORK—New York State Department of Environmental Conservation (DEC) Commissioner Joe Martens gave his seal of approval on extracting natural gas from 85 percent of the Marcellus Shale in upstate New York using high-impact horizontal hydraulic fracturing, or hydrofracking, on Friday.

The method involves extracting natural gas by breaking up shale with a solution of water and toxic chemicals, the disposal of which has contaminated drinking water in Pennsylvania. With fracking comes a whole slew of concerns from leaking well casings, to air pollution caused by well site machinery, to noise and falling property values.

Martens marked as off-limits the New York City and Syracuse watersheds, along with aquifers and other drinking water sources. He vowed to stringently enforce proper wastewater disposal, crack down on greenhouse gas emissions, require additional well casing, and take other steps to ensure operations run without incident.

While satisfying some moderate opponents to fracking, many upstate New Yorkers still don't want fracking in their neighborhood, and they might still have the power to do something about it.

Governor Andrew Cuomo is likely to codify the DEC recommendations into law, opening private land up to fracking. Municipalities however still have the power to enact zoning laws to keep oil companies out. Martens reported that fracking could only take place in the appropriate industrial zones.

An attorney in Cooperstown, N.Y., Michelle Kennedy, already suspected this would be the key to shutting down fracking operations. She is leading the towns of Middlefield and Otsego in an initiative to beef up their zoning laws and keep would-be frackers out.

“This is an industrial activity that may not be compatible with already existent uses within the town, or based upon a comprehensive plan could be generally prohibited within the town ... just like any use may not be permitted under zoning law,” said Kennedy in a phone interview.

She points to a precedent set by cases involving the mining of solids. In *Free Run Gravel Products vs. Town of Carroll* in 1987 and *Gernatt Asphalt Products Inc. vs. the Town of Sardinia* in 1996, the towns were able to shut out mining operations using zoning regulations. The cases were upheld right through to the State Court of Appeals.

“We would anticipate the same result in the case of natural gas extraction,” said Kennedy.

When asked whether he thinks municipalities that are opposed to fracking might successfully pursue this course of action, Martens replied that, “The law is not perfectly clear ... I think we'll see some legal challenges along the way that will make that clearer.”

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The DEC and State are still months away from actually issuing any new permits for fracking. A public review period opens up in August after the final DEC report is released with the results of some additional studies on socioeconomic impacts still taking place. After 60 days of public review, all comments must be reviewed, a process that is not likely to be completed this year.

In the meantime, opponents of fracking are still searching for a way to stop the drills from touching down.